

1BNLMUNC

1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

3 -----x
4 IN RE: MUNICIPAL DERIVATIVES
5 ANTITRUST LITIGATION

08 CV 2516 (VM)

6 -----x
7 New York, N.Y.
8 November 23, 2011
9 9:34 a.m.

10 Before:

11 HON. VICTOR MARRERO,

12 District Judge

13 APPEARANCES

14 HAUSFELD LLP

15 Attorneys for Plaintiffs Mississippi, Bucks County, et al.

16 BY: HILARY K. SCHERRER

17 -and-

18 SUSMAN GODFREY LLP

19 BY: SETH ARD

20 SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP

21 Attorneys for Defendant Morgan Stanley

22 BY: SHEPARD GOLDFEIN

23 PAUL M. ECKLES

24 NICHOLAS DANELLA

25 COOK, HALL & LAMPROS

Attorneys for Plaintiff State of West Virginia

BY: CHRIS HALL (by telephone)

COTCHETT PITRE & MCCARTHY

Attorneys for Plaintiff City of Los Angeles

BY: DANIEL STERRETT (by telephone)

1BNLMUNC

1 (In open court)

2 THE COURT: This is a proceeding in the matter of
3 Municipal Derivatives Antitrust Litigation, docket No. 08 Civil
4 2516, and it is one of the cases transferred to this Court by
5 the multidistrict litigation panel under MDL No. 1950.

6 The Court scheduled this proceeding in order to
7 consider the application of the parties for an order and final
8 judgment settling the claims of one of the group of plaintiffs
9 with one of the defendants, Morgan Stanley. Previously by
10 order dated October 6 of this year, 2011, the Court had
11 approved an order granting the plaintiffs' counsel, lead
12 counsel, fees and costs of this litigation.

13 So, this proceeding will be to create the record
14 necessary for the Court to make its findings under appropriate
15 case law that the settlement proposed of this class action is
16 fair and reasonable in light of all of the factors set forth by
17 the Second Circuit in the applicable case law, specifically
18 that the settlement is justified in light of the complexity of
19 the case, the issues that were considered, the likelihood of
20 further litigation and implications of any such litigation, and
21 the other factors that go into a determination that this
22 settlement is fair and reasonable to the class and would
23 support a finding by the Court as a matter of fact.

24 For the plaintiffs, who speaks, Ms. Scherrer?

25 MS. SCHERRER: Good morning, your Honor. Hilary

1BNLMUNC

1 Scherrer from Hausfeld LLP for the class plaintiffs. I'm happy
2 to go through the *Grinnell* factors. I'm prepared to do that or
3 if your Honor wants to truncate this with any questions, we
4 can.

5 THE COURT: Just go through the factors briefly.

6 MS. SCHERRER: Okay. As you know, we're here today
7 seeking approval of a \$6.5 million settlement with Morgan
8 Stanley. It was the product of extensive arm's length
9 negotiations and represents an excellent result for the class.

10 In addition to the \$6.5 million settlement amount,
11 obviously less the 1.55 million in attorneys' fees and costs,
12 Morgan Stanley has agreed to cooperate with plaintiffs in an
13 ongoing prosecution of this litigation against the non-settling
14 defendants.

15 The agreed-to cooperation including proffers to
16 counsel regarding the structure of the municipal derivatives
17 industry, as well as Morgan Stanley's participation in the
18 alleged anticompetitive transactions, production of documents
19 that were previously produced to the Department of Justice and
20 any state attorneys general regarding anticompetitive
21 investigations in the municipal derivatives industry.

22 THE COURT: Ms. Scherrer, let me just interrupt for a
23 moment. I forgot to mention that there are some interested
24 parties who asked to join this conference by telephone and I
25 just want to indicate that they are on now.

1BNLMUNC

1 Would the parties who are on the phone please identify
2 yourselves so that we have you on the record.

3 MR. HALL: Yes, Judge. Thank you. This is Chris Hall
4 with the law firm Cook, Hall & Lampros. I represent the State
5 of West Virginia.

6 MR. STERRETT: Good morning, your Honor. This is
7 Daniel Sterrett from Cotchett, Pitre & McCarthy, representing
8 the City of Los Angeles, et al.

9 THE COURT: Thank you. And I appreciate your making
10 yourselves available by telephone for this proceeding.

11 Ms. Scherrer, proceed.

12 MS. SCHERRER: Yes, your Honor. I was discussing the
13 cooperation that was agreed to under this settlement agreement.
14 This also includes interviews of three current officers or
15 employees of Morgan Stanley.

16 To date, the plaintiffs have received one proffer and
17 conducted an interview of a Morgan Stanley witness. They've
18 also received the production of nearly 2.5 million documents
19 for review.

20 As the Court is aware, this settlement was
21 preliminarily approved on January 14, 2011. Notice was issued
22 to class members via direct mail notification and publication
23 notice in July. There are been no objections to the settlement
24 and we've received only 76 requests for exclusion, which is
25 less than 1 percent of the potential settlement class.

1BNLMUNC

1 As you are aware, the Court must find that the
2 settlement is fair, adequate, and reasonable. Those factors
3 for making this determination were set forth by the Second
4 Circuit in *City of Detroit v. Grinnell*.

5 The nine factors are the complexity, expense, and
6 likely duration of the litigation; the reaction of the class to
7 the settlement; the stage of the proceedings and amount of
8 discovery completed; the risks of establishing liability; the
9 risks of establishing damages; the risks of maintaining the
10 class action through trial; the ability of the defendants to
11 withstand a greater judgment; the range of reasonableness of
12 the settlement in light of the best possible recovery; and the
13 range of reasonableness of the settlement in light of all of
14 the attendant risks of litigation.

15 With respect to the first factor, the complexity,
16 expense, and likely duration of the litigation, this was a
17 federal antitrust case. These are notoriously complex,
18 protracted, and this case was no different. It was filed in
19 2008 and involves bid rigging and other anticompetitive
20 activities in the complex municipal derivatives industry.

21 Demonstrating liability and proving damages against
22 the large number of defendants has already required extensive
23 discovery, including the review of thousands of hours of audio
24 tapes and millions of pages of documents. It has also required
25 the expenditure of substantial monetary resources. Plaintiffs

1BNLMUNC

1 expect the litigation in this case will continue to require
2 vast resources, particularly given the discovery stays that
3 continue to be requested by the Department of Justice.

4 With respect to the second factor, the reaction of the
5 class to the settlement, as I mentioned earlier, we have no
6 objectors to this settlement and there are 76 opt-outs out of
7 over 60,000 potential class members that were noticed. The
8 objection deadline was October 11, so we don't expect any more
9 to come in.

10 The third factor is the stage of proceedings and the
11 amount of discovery completed to date -- I'm sorry -- the
12 amount of discovery completed at the time of settlement. Due
13 to the stays, there was a limited amount of discovery that was
14 completed at the time of settlement. However, clearly, counsel
15 did feel they had sufficient information in order to properly
16 evaluate the risks of settling versus continuing with the
17 litigation.

18 Additional information obtained through cooperation
19 and through discovery since the settlement was entered into has
20 confirmed that while Morgan Stanley faced some risk of
21 liability, the benefits of settlement outweighed the costs and
22 risks associated with further litigation against Morgan
23 Stanley.

24 The fourth, fifth, and sixth *Grinnell* factors are the
25 risks of establishing liability and damages and maintaining the

1BNLMUNC

1 class action through trial. If plaintiffs continue to litigate
2 against Morgan Stanley, they expect that Morgan Stanley would
3 assert defenses at each stage of the litigation, including
4 class certification stage, summary judgment, and at trial, and
5 plaintiffs would face steep monetary costs associated with
6 defending at each stage.

7 While there are 11 criminal cases involving 19
8 individual, corporate, and individual defendants, none of these
9 are former or current Morgan Stanley employees. And,
10 additionally, because liability is joint and several under the
11 Sherman Act, there is no risk of the damages -- I'm sorry --
12 because liability under the Sherman Act is joint and several,
13 the settlement in no way prejudices the ability of the
14 settlement class to recover its full amount of treble damages.
15 Additionally, the settlement secured Morgan Stanley's full
16 cooperation, which is invaluable in the prosecution of this
17 litigation going forward.

18 Accordingly, the benefits of settlement as discussed
19 earlier outweigh the risks of litigation.

20 The seventh factor is the ability of Morgan Stanley to
21 withstand a greater judgment. I think everyone agrees that
22 Morgan Stanley is a financial institution that could likely
23 withstand a greater judgment. However, again, plaintiffs
24 believe that the costs and risks associated with further
25 litigation outweigh this factor.

1BNLMUNC

1 The eighth and ninth factors are the range of
2 reasonableness of the settlement in light of the best possible
3 recovery and the attendant risks of litigation. Again, this
4 settlement contains a substantial cash payment of \$6.5 million
5 and cooperation that we think is invaluable in the ongoing
6 litigation. And, again, we think that the risks of further
7 litigation are outweighed by the settlement.

8 Therefore, we respectfully submit that the settlement
9 should be granted final approval.

10 THE COURT: Thank you. Ms. Scherrer, one question
11 that comes to mind, you mentioned treble damages. As you're
12 undoubtedly aware, the antitrust division brought a criminal
13 case against some of the defendants, some defendants who are
14 involved in the same conduct that you're charging here against
15 Morgan Stanley. That case is scheduled to go to trial in just
16 another month and a half.

17 Assuming for the moment that the judgment were to be
18 rendered their liability or guilt on the part of the
19 defendants, establishing a record of the conduct that you're
20 alleging here against Morgan Stanley, that judgment would
21 become essentially res judicata as to some of these issues
22 under the Clayton Act. Presumably, some plaintiffs might be
23 able to use it to support litigation against other defendants
24 and conceivably obtain treble damages.

25 So, how does that weigh in the scheme of things with

1BNLMUNC

1 the settlement of this case now?

2 MS. SCHERRER: Well, your Honor, I think plaintiffs
3 feel as if they've done extensive due diligence here with
4 respect to the settlement as to Morgan Stanley and feel that
5 this is a fair settlement as to Morgan Stanley given their
6 participation in the alleged conspiracy, I should say what we
7 believe is their limited participation in the alleged
8 conspiracy.

9 If for some reason which we don't foresee it comes out
10 at the criminal trial that their participation was greater than
11 expected, as you know, the liability is joint and several and
12 so those transactions would or additional damages would remain
13 available in the case for plaintiffs to pursue against other
14 defendants.

15 THE COURT: Thank you. Anything else?

16 MS. SCHERRER: In addition to finding the settlement
17 is fair and reasonable and adequate, your Honor needs to also
18 find that the notice issued by the class comported with due
19 process and meets the requirements of Rule 23(e)(1) and
20 Rule 23(c)(2)(B). I'm happy to go through those factors as
21 well.

22 THE COURT: Do so briefly just for the record.

23 MS. SCHERRER: Sure. On June 29, 2011, you approved
24 the form of notice and the comprehensive notice program that
25 provided extensive direct notice to all class members that were

1BNLMUNC

1 reasonably identifiable and publication notice providing
2 summary notice in national, local, and trade print
3 publications, as well as web-based publications.

4 On July 11 and 12, 2011, the direct mail notice was
5 sent out to over 60,000 potential settlement class members.

6 The direct mail notice provided class members with
7 detailed information in plain language about the action and
8 proposed settlement which included the nature of the action and
9 class certified; the claims, issues and defenses; a summary of
10 the monetary terms of the settlement and the plan of
11 allocation; the right of class members to appear through their
12 own attorney; the right to request exclusion and the times and
13 means of doing so; and the binding nature of the judgment,
14 including information about the nature of the class release.

15 And for your information, a copy of the direct mail
16 notice is attached to the affidavit of Eric Miller which was
17 submitted with our papers.

18 Notice of settlement was also published in a number of
19 publications which were selected to ensure that decision-makers
20 that purchase municipal derivatives would be reached with
21 notice. Those publications included the Wall Street Journal,
22 the American School Board Journal, the Bond Buyer, the
23 Chronicle of Higher Education, County News, Governing,
24 Healthcare Finance, Municipal Sewer and Water, Nation's Cities
25 Weekly, Public Management, Public Works, State Legislatures,

1BNLMUNC

1 U.S. Mayor, El Nuevo Dia, El Vocero Pacific Daily News, Primera
2 Hora, Saipan Tribune Samoa News, St. Croix Avis, St. Johns
3 Trade Winds, Virgin Islands Daily News.

4 The publication notice included abbreviated
5 information regarding the settlement, including the monetary
6 terms, the right of the settlement class members to speak with
7 their own attorney at their own expense, and right to object or
8 opt out of the settlement.

9 The publication notice also advised class members that
10 they could obtain additional information via a toll-free phone
11 number as well as a website that was set up by the claims
12 administrator, www.MunicipalDerivativesSettlement.com.

13 Around July 11, Rust, which was the claims
14 administrator, posted a number of the court documents as well
15 as the settlement agreement, the preliminary approval order on
16 that website. The website also contains answers to frequently
17 asked questions.

18 As of October 31, the website was visited by at least
19 3,686 -- I should say it was visited 3,686 times and the
20 toll-free information line received 503 calls. As a result of
21 those visits and calls which resulted in inquiries, Rust mailed
22 additional direct mail notices to class members.

23 Again, we respectfully submit that this notice program
24 complied with due process as well as the requirements of
25 Rule 23.

1BNLMUNC

1 THE COURT: All right. Thank you. Ms. Scherrer, you
2 mentioned that there was 70 plus members of the class who
3 essentially opted out.

4 MS. SCHERRER: Seventy-six, yes.

5 THE COURT: Seventy-six. Do you represent that each
6 of these 76 followed the procedure in full insofar as having
7 had sufficient notice and filling out whatever appropriate form
8 and giving you and the settlement administrator the proper
9 notice of having complied with all of the procedures?

10 MS. SCHERRER: Yes, your Honor, we do. As you may
11 have noticed, there was a footnote in our brief when where
12 mentioned the State of Massachusetts and the State of Oregon.
13 The attorneys general for those two states opted out the
14 states, as well as entities of the state for which they claimed
15 to have sole legal authority to represent. We have had some
16 exchange of correspondence with those two attorneys generals in
17 order to get more specific information as to the entities of
18 state that they're opting out. They have not provided any
19 additional information.

20 At this point we are content to proceed forward. If
21 this becomes an issue during the claims administration process,
22 that's something we can bring to your attention at that stage.

23 THE COURT: All right. Thank you.

24 Mr. Goldfein.

25 MR. GOLDFEIN: Good morning, your Honor, and thank

1BNLMUNC

1 you. I'm Shepard Goldfein from Skadden Arps. We represent
2 Morgan Stanley. I wanted to answer your question a little bit
3 differently with regard to the implications of the criminal
4 matter.

5 Morgan Stanley has not been named as an unindicted
6 coconspirator in the bill of particulars, as far as we've been
7 able to follow the proceedings in the criminal matters, nor
8 have any of its employees been named as unindicted
9 coconspirators.

10 In addition, based on the documents that we produced
11 and the proffer that we made to plaintiff's counsel of a
12 witness and his views about the structure of the industry but,
13 more importantly, the underlying facts, I don't believe there's
14 any evidence whatsoever that Morgan Stanley was implicated in
15 any wrongdoing regarding the allegations involved in this case.

16 I can't speak for the other hundreds, thousands of
17 tapes or other documents plaintiffs have reviewed, obviously,
18 in their files from the other defendants. But I can tell you
19 that Morgan Stanley has not been indicted and not been named in
20 any of the proceedings.

21 Under the Clayton Act's provisions, I do not believe
22 that any findings that would be made in the criminal case would
23 be admissible as prima facie evidence of guilt against Morgan
24 Stanley or liability in the civil litigation, which is what the
25 statute provides.

1BNLMUNC

1 So in response to your question, I don't think that
2 there would be any implication as far as I know to date. It
3 would be something that would have to come up during the trial
4 perhaps that could theoretically occur. But based on what I
5 know today, there would be no implications of the criminal
6 matter as to Morgan Stanley.

7 And settlement was a very hard-negotiated agreement
8 between us and plaintiffs' counsel. It was really a settlement
9 that plaintiffs' counsel was very sensitive in finding and
10 getting to a number that they could justify as fair,
11 reasonable, and adequate to the class.

12 Morgan Stanley's point of view is it was a settlement
13 that had to take into consideration the potential exposure in
14 any jury trial that can occur. As your Honor knows, things
15 that one might not predict often occur before a jury. But,
16 nevertheless, we took into consideration the legal fee and
17 costs associated with disruption to the business and diversion
18 of management's time to litigation.

19 So, we earnestly believe this is a fair, reasonable,
20 and adequate settlement. I just wanted to respond to your
21 question that you had asked. Thank you.

22 THE COURT: All right. Thank you. I appreciate that,
23 Mr. Goldfein. I'm not sure if you may be aware of the scope of
24 that criminal trial and the information that's before the
25 Court. The parties have estimated that the amount of discovery

1BNLMUNC

1 that the government has produced to the defendants in that case
2 exceeds four terabytes of material, which I have seen various
3 estimates translating them to paper documents that exceed
4 hundreds of millions of pieces of paper, audio tapes,
5 conversations, etc. So, one never knows what's in there.

6 MR. GOLDFEIN: That's my point.

7 THE COURT: All right. Well, thank you very much.

8 If there is no one else who wishes to address the
9 Court on this matter, I will declare the hearing closed and the
10 record closed.

11 Based on the submissions that the parties have made in
12 support of the settlement and the representations made to the
13 Court at this hearing, I am persuaded that the Court can find
14 the factors set forth by the Second Circuit in the *Grinnell*
15 case in favor of an approval of the settlement as fair and
16 reasonable and adequate to the class for all of the reasons set
17 forth on this record, and I will so find and so order in
18 issuing approval in a final judgment today.

19 Anything else?

20 MR. GOLDFEIN: Thank you very much, your Honor.

21 THE COURT: Thank you. Have a good day and a good
22 holiday.

23 o0o
24
25